

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

T.R.P. COMPANY, INC.

Plaintiff,

v.

SIMILASAN AG AND SIMILASAN  
CORPORATION,

Defendants.

Case No.: 2:17-cv-02197-JCM-CWH

**~~PROPOSED~~ ORDER GRANTING IN  
PART AND DENYING IN PART  
SIMILASAN CORPORATION'S  
MOTION TO COMPEL (ECF NO. 86)**

The Court has considered Defendant Similasan Corporation's ("Similasan Corp.") Motion to Compel (ECF No. 86), the Opposition of Plaintiff T.R.P. Company, Inc. ("TRP") (ECF No. 88), and Similasan Corp.'s Reply (ECF No. 92), as well as the declarations, deposition testimony and evidence submitted therewith, and the argument of counsel at the April 2, 2019 hearing.<sup>1</sup> As the Court noted in the Minute Order (ECF No. 100) and at the hearing (ECF No. 101), the Motion to Compel is granted in part and denied in part as follows.

1. The Motion to Compel is granted on the issue of express waiver of the attorney-client privilege, and TRP is ordered to produce the documents identified as numbers 14, 121-125 and 127 in its privilege log (ECF No. 87-3, Exhibit 2), and any other documents in its possession, custody, or control that relate to or reflect privileged communications between

<sup>1</sup> The confidential and sealed versions of Similasan Corporation's Motion to Compel and Reply are reflected in the docket at ECF No.'s 87 and 93. These and the other related confidential filings were considered by the Court as well.

1 attorney John Long and TRP concerning trademark rights to, the application for, and  
2 supplemental registration of "PinkEye Relief." With respect to the supplementation of TRP's  
3 responses to Similasan Corp.'s interrogatories identified in the Motion, the Court reserves ruling  
4 on such further discovery requests at this time and orders the parties to meet and confer on this  
5 subject, if appropriate, after Similasan Corp. has reviewed TRP's production pursuant to this  
6 Order.  
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8 The Court finds that the express waiver occurred on pages 71-72 of the deposition  
9 transcript of TRP's President Mr. Pominville (ECF No. 87-6, Ex. 5, p. 9) and in TRP's response  
10 to Similasan Corp.'s Interrogatory No. 16 that was verified by Mr. Pominville (ECF No. 87-17,  
11 Ex. 16, pp. 6-7).

12 2. The Motion to Compel is denied at this time on the issue of implied waiver of  
13 the attorney-client privilege as to communications between attorney John Long and TRP (or  
14 TRP communications reflecting Mr. Long's advice), concerning TRP's application and  
15 supplemental registration for PinkEye Relief, Earache Relief and Allergy Eyes Relief. The  
16 Court is not persuaded that there is an assertion of an advice of counsel defense by TRP in  
17 response to Similasan Corp's claims of fraud on the United States Patent and Trademark Office.  
18 The Court finds that an advice of counsel defense has to be the foundation for the basis of an  
19 implied waiver. The Court's finding as to a lack of implied waiver does not conflict with the  
20 Court's order as to an express waiver concerning the PinkEye Relief communications identified  
21 in paragraph 1 above. The Court simply finds that there has not been a waiver as to the  
22 PinkEye Relief communications on the additional grounds of implied waiver.  
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24 3. The Motion to Compel is denied as to a waiver of the attorney-client privilege  
25 through communications that involved advice from attorneys John Long or Jack Hanifan, and  
26 were directed to or included Susan Hanson, Ray Hanson and/or Brian Banks. Susan Hanson is  
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1 the sister of Tom Pominville and Ray Hanson is his brother in law. Neither Ms. Hanson, Mr.  
2 Hanson, nor Brian Banks was an employee of TRP during the timeframes of the  
3 communications that have been identified in TRP's privilege log. ECF No. 87-3, Exhibit 2.  
4 However, the Court finds that each of these individuals were "functional equivalents" of TRP  
5 employees based upon their title(s), responsibilities, roles in the operation of TRP and/or  
6 familial relationship with Mr. Pominville in the relevant timeframes based on the affidavits  
7 from Ms. Hanson, Mr. Hanson, and Mr. Pominville, and other evidence TRP submitted. ECF  
8 Nos. 88-3, 88-4, 88-5. Their communications with attorneys Long and Hanifan, or concerning  
9 their advice, were therefore privileged communications between TRP and these attorneys.  
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12 DATED: April 23, 2019

**IT IS SO ORDERED**

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16 **C.W. HOFFMAN, JR.**  
17 **UNITED STATES MAGISTRATE JUDGE**  
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1 Respectfully submitted by:

2 Dated: April 16, 2019

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4 By: /s/ Michael D. Rounds

Michael D. Rounds (NV Bar No. 4734)

5 Ryan Cudnik (NV Bar No. 12948)

BROWNSTEIN HYATT FARBER

6 SCHRECK, LLP

5371 Kietzke Lane

7 Reno, NV 89511

8 Telephone: (775) 324-4100

Facsimile: (775) 333-8171

9 Email: mrounds@bhfs.com

rcudnik@bhfs.com

10 Emily Ellis (NV Bar No. 11956)

11 Brownstein Hyatt Farber Schreck, LLP

12 100 North City Parkway

Las Vegas, Nevada 89106-4614

13 Telephone: (702) 382-2101

Facsimile: (702) 382-8135

14 Email: eellis@bhfs.com

15 Michelle Gillette (*pro hac vice*)

16 CROWELL & MORING LLP

3 Embarcadero Center, 26th Floor

17 San Francisco, CA 94111

Telephone: (415) 986-2800

18 Facsimile: (415) 986-2827

19 Email: mgillette@crowell.com

20 Valerie Goo (*pro hac vice*)

21 CROWELL & MORING LLP

515 S. Flower Street, 40<sup>th</sup> Floor

22 Los Angeles, CA 90071

Telephone: (213) 443-5505

23 Facsimile: (213) 622-2690

Email: vgoo@crowell.com

24 *Counsel for Defendants*

25 *SIMILASAN CORPORATION and SIMILASAN AG*

1 Michael N. Feder  
2 DICKINSON WRIGHT PLLC  
3 8363 West Sunset Road, Suite 200  
4 Las Vegas, NV 89113  
5 Telephone: (702) 550-4400  
6 Facsimile: (844) 670-6009  
7 Email: mfeder@dickinson-wright.com

8 Daniel S. Silverman  
9 VENABLE LLP  
10 2049 Century Park East, Suite 2300  
11 Los Angeles, CA 90067  
12 Telephone: (310) 229-0373  
13 Facsimile: (310) 229-9901  
14 Email: dssilverman@venable.com

15 Meaghan H. Kent  
16 VENABLE LLP  
17 600 Massachusetts Ave., NW  
18 Washington, DC 20001  
19 Telephone: (202) 344-4000  
20 Facsimile: (202) 344-8300  
21 Email: MHKent@venable.com

22 *Attorneys for Plaintiff/Counter-Defendant*  
23 *T.R.P. Company, Inc.*  
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**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b), I certify that I am an employee of BROWNSTEIN HYATT FARBER SCHRECK, LLP, and on this 16<sup>th</sup> day of April, 2019, I served the document entitled, **[PROPOSED] ORDER GRANTING IN PART AND DENYING IN PART SIMILASAN CORPORATION'S MOTION TO COMPEL (ECF NO. 86)**, on counsel of record through the CM/ECF system.

/s/ Jeff Tillison  
Employee of Brownstein Hyatt Farber  
Schreck, LLP